



# **Ethical Issues in Representing Children in Child Protection**

# Child Development:

## Why Background Education is a Good Idea!

- The decision regarding a child's capacity lies first with *YOU*!
- General child development background will help you know what to expect from your child client given age and state of development
- Trauma-informed child development education is also helpful. Children in the legal system often have been traumatized and may not relate to the world or reflect levels of maturity typical of non-traumatized children of the same age
- Child development education will help you determine how to communicate with the child in an appropriate manner and how much information you must communicate to enable the child to make decisions.

# Maintaining a “Normal Client-Lawyer Relationship”

- Idaho Rules of Professional Conduct, Rule 1.14: Client with Diminished Capacity:
  - 1.14(a) “When a client’s capacity to make adequately considered decisions in connection with representation is diminished, ... because of minority, ... the Lawyer shall, as far as reasonably possible, ***maintain a normal client-lawyer relationship***”
  - Commentary § 1: “[A] client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s own well-being.”

# Line Between “Normal Client-Lawyer Relationship” & Diminished Capacity

- IRPC 1.14(a). When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

# Hallmarks of a “Normal Client-Lawyer Relationship”

- Diligence and Competence
- Loyalty (abiding by client's decisions, avoiding conflicts)
- Defining the scope and goals of representation
- Consultation and Communication
- Confidentiality

# Establishing a Normal Client-Lawyer Relationship

- If at all possible, try not to meet your client for the first time at a courthouse
  - Meeting in-person prior to Court hearings allows a lawyer to assess the child's circumstances
  - Meetings in the community or at the child's placement are preferred because the child may be more comfortable and the lawyer will have a chance to observe how the child interacts with caretakers and others\*
  - If you are being called in for a shelter care hearing, the Courthouse may be it! Seek a quiet, and private location to meet the client

***\*The ABA Standards of Practice for Lawyers Representing a Child in Abuse and Neglect Cases***

# Communication and consultation

## ➡ RULE 1.4: COMMUNICATION

### ➡ (a) A lawyer shall:

- ➡ (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- ➡ (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- ➡ (3) keep the client reasonably informed about the status of the matter;

# Communicating with a Child Client

## ➤ IRPC 1.4(b): COMMUNICATION

- A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
- Comment [6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. See Rule 1.14.



# Scope of the Representation in CP Cases

- I.C. 16-1614 & IJR 37 : Children 12 and older are entitled to appointment of counsel.
- If a GAL is appointed, the GAL is entitled to separate counsel.
- IJR 40(c): Children over 8 have a right to notice and to be present at hearings
- If the court's order does not define scope of responsibility a lawyer should request clarification from the judge.

# Confidentiality

- IRPC 1.6: CONFIDENTIALITY OF INFORMATION
- (a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
  - ...
  - (6) to comply with other law or a court order;

# Loyalty: Avoiding conflicts

- The Idaho Supreme Court has recently clarified that an individual cannot be simultaneously appointed as a lawyer and GAL. In the Interest of Jane Doe II (2018-11), \_\_\_ Idaho \_\_\_, 425 P. 3d 285 (2018).
- Idaho Code § 16-1614 was revised to clarify that one person cannot fulfil the role of GAL and lawyer. The legislative history is that the statute formerly provided for the appointment of counsel “with the powers and duties of a GAL.” This language was eliminated from the current statute.

# Expanding the scope of representation

## Rule 1.14(b): reasonably necessary protective action

- Idaho Rules of Professional Conduct, Rule 1.14: Client with Diminished Capacity:
  - “b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
  - Comments to IRPC 1.14 strongly imply that a lawyer should take protective action in the case of a child client who “lacks sufficient capacity to communicate or to make adequately considered decisions.” See Comments 1 and 5.

# Deciding Whether the Child can Make Considered Decisions.

- The question of capacity is up to the lawyer to decide in this context
- Focus on the quality of the decision-making, not the wisdom of the decision
- Consider that the Child may be able to make some decisions and not others
- Consider that the Child's ability to make decisions may change over time
- Maximize child's ability to participate in the litigation

# Child's Considered Decision -- Some Factors to consider (Consider guidance in IJR 37(a))

- Age, cognitive ability, language
  - The lawyer may need to consult with child's mental health providers or others
- Emotional and mental development and stability
- Child's ability to communicate.
  - For example -- Can the child articulate reasons for her decisions
- Is child consistent in expressing wishes
- Is child influenced by wishes of adults or siblings around her
- Does child understand consequences (e.g., have sense of time, permanence)
- Can child hold and weigh multiple choices in her head

# Factors to Guide Decision to Take Protective Action

- The factors for appointment of counsel to a child under 12 (IJR 37(a)) are relevant:
  - Child's age, maturity & intellectual ability
  - Child's ability to direct the activities of counsel
- The wishes and values of the client to the extent known
- The client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent possible
  - The term "protective measures" not a euphemism for substituted judgment!
- Maximizing client capacities
- Respecting client's family and social connections
- Consider the impact of your determination. Will it be public? Could that present problems for your client?


# Examples of Protective Action


- Request appointment of a guardian if one has not been appointed
- Using a reconsideration period to assist the client to clarify his/her thinking or to seek improvement of the client's circumstances
- Consulting with family members if appropriate
- Consulting with professionals who can protect the client



# Confidentiality – Diminished Capacity


- IRPC 1.14(b): additional exception to IRPC 1.6
- Idaho Rules of Professional Conduct, Rule 1.14: Client with Diminished Capacity:
  - “(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.”

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- Charlie is six years old and in foster care. Mom is an active meth user, dad is in jail pending trial on sex abuse charges allegedly involving a neighbor child. The court has scheduled a permanency review hearing. IDHW and CASA are both recommending that the court approve a permanency plan of termination of parental rights, and that reasonable efforts to reunite the family cease. Charlie has told Linda that he loves his mom and dad and wants to go home with them. Linda has given the matter considerable thought, and at the hearing Linda joins in the recommendations of IDHW and CASA to terminate parental rights.
  - Has Linda violated her professional obligations to Charlie?
  - Absent additional facts, YES! Linda's role as Charlie's lawyer is to present Charlie's perspective as long as she has concluded that he can make a considered decision. Remember, it's the quality of Charlie's decision-making, not the wisdom of his decision that should guide Linda.

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- What if dad was convicted of sexually abusing Charlie? Has Linda violated her professional obligations to Charlie under this circumstance?
  - This does not change Linda's obligations to Charlie assuming Charlie has made a considered decision. Just as with the original version of the hypo, Linda's focus should be on the quality of Charlie's decision-making not the wisdom of the decision. There may be other options that would accomplish at least some of Charlie's desires -- Charlie could go home with Mom, protective provisions could be put in place, etc.
  - Since Charlie might be exposed to physical harm you should think about these things:
    - Does the child have diminished capacity such that you should take protective actions such as
      - seeking the appointment of a GAL
      - agree to the termination as to the Dad but object as to Mom
      - talk to the child's counselor about how to address the child's trauma
      - Talk to Mom about how she intends to protect Charlie from Dad.
    - Linda should also think about necessary steps to protect Charlie's safety in any case.

- What if Charlie is sixteen? Has Linda violated her professional obligations under this circumstance?
  - Charlie's age does not change Linda's professional obligations. The same process outlined in the last hypo should be followed here. Age may simply be a factor in evaluating whether Charlie can make a considered decision.
- What if Linda simply remained silent as to Charlie's wishes are regarding termination of parental rights? Has Linda violated her professional obligations?
  - This would certainly violate her obligations to Charlie! In this situation silence is essentially agreement. She has been directed to take action related to the outcome of the litigation and she has failed to follow that direction! Revisit IRPC 1.4 and 2.

- ▶ Charlie is six years old and in his third foster care placement. Charlie has fallen behind in school and is participating in an I.E.P. that involves Charlie receiving after school tutoring. This tutoring program has helped Charlie begin to catch up to his expected grade level. At a meeting before court, Charlie tells Linda that the foster parents have stopped taking Charlie to the tutoring program, and that his grades have begun to suffer as a result. But he asks Linda not to tell anyone because he really likes his foster family (they have an awesome pool) and he does not want to be moved again to another foster family. Contrary to Charlie's request, Linda tells IDHW that the foster family is not following the I.E.P. Has Linda violated her professional obligations to Charlie?
- ▶ Most likely, Yes. Linda should ask herself whether Charlie is making a considered decision, remembering, as in the previous hypo, to focus on quality not wisdom. If Charlie's decision is considered, she must follow his direction. If not, Linda should make the diminished capacity determination and take appropriate protective action. Protective actions should respect the client's autonomy and right to confidentiality as much as possible. Here protective actions could include consulting an external professional and taking appropriate action.

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- What if Charlie was missing dental appointments to save his teeth? Does this change Linda's Professional obligations?
    - The result is the same – the primary issue is not the nature of the harm – its Charlie's ability to make a considered decision!
  - What if Charlie is sixteen? Does this change Linda's obligations?
    - The attorney's analysis should be the same here. The fact that Charlie is 16 will change the nature of the attorney's decision about whether Charlie has made a considered decision.